United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-2124

United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

-against-

JOSEPH MAURO,

Appellant.

On Appeal From The United States District Court
For The Eastern District Of New York

Appellant's Brief

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TABLE OF CONTENTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

The appellant appeals from a judgment rendered in the United States District Court for the Eastern District of New York (Hon. Jacob Mishler, Chief Judge thereof, before whom the case was tried) whereby the appellant was convicted after trial before Court and jury under counts 1, 2, and 4 of indictment number 72-CR-858. These counts related to the possession and concealment of certain United States Federal Reserve Notes, count 1, 18 U.S.C. 472; the transferring and delivering of counterfeit money, count 2 thereof, 18 U.S.C. 473; and the conspiracy with one Louis J. Stoppiello, to possess, conceal and sell counterfeit obligations and securities of the United States, under count 4, 18 U.S.C. 371.

As a consequence of being found guilty and convicted, the appellant was sentenced July 26, 1974 as follows: two (2) concurrent two (2) year jail terms on the second and fourth counts of the indictment; the appellant was placed on probation under the first count of the indictment. The jail terms were to commence after the completion of a sentence that was heretofore imposed upon the petitioner upon his conviction in the United States District Court, Southern District of New York for a violation of 18 U.S.C. 371 and for possession of stolen bank property under 18 U.S.C. 2123. That sentence was concurrent three (3) year jail terms.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the warrantless seizure of a car driven by the appellant at the time of the appellant's arrest January 4, 1972 in conformity with the 4th Amendment to the Federal Constitution and was the subsequent dismantling of the car which the authorities seized, and found counterfeit money, reasonable when at such time the Magistrate for the Eastern District of New York directed a dismissal of the charges and the charged were dismissed? Further, was the initial seizure of the car reasonable under the 4th Amendment to the Federal Constitution where there was no showing or proof that the car contained any counterfeit money or was used to facilitate the possession and transfer of such counterfeit money?

2. Was the Court correct in denying the motion for the suppression of the evidence found in the car on the ground asserted by the Court that the application to suppress was not timely?

STATEMENT OF THE CASE AGAINST THE APPELLANT

At the outset and for the Court's convenience, it is brought to this Court's attention that the indictment herein was consolidated with another indictment charging the appellant with other crimes. That indictment bears number 72 CR 857 and charged the appellant with violating 18 U.S.C. 894 (a), the illegal extension of credit. Trial under that indictment was therefore consolidated with the trial which this Court is now concerned with. However the same jury that convicted the appellant under the indictment at issue, acquitted the appellant of violating 18 U.S.C. 894 (a).

The basic issues presented here relate to the seizure of the appellant's car when he was initially arrested January 4, 1972. However, objectivity would require that this Court be made aware of the salient facts leading to the appellant's arrest, and the seizure of the car, the holding of the car for about two (2) months by the authorities, the dismantling of a portion of the car, whereby counterfeit money was found concealed therein.

According to a government witness named Louis Stoppiello the appellant prior to October 1971 was lending him money. Stoppiello fell behind in payments. The appellant and Stoppiello discussed ways that repayment could be made (A6, A10, A11)*. In October 1971 Stoppiello and the appellant discussed the distribution of counterfeit money whereby the witness in transferring such counterfeit money was to be credited in regard to the accrued interest due the appellant (A16, A17). This witness however never kept records of any loans that were allegedly made by the appellant to him (A17, A18).

In October and November of 1971 the appellant was said by Stoppiello to have given him counterfeit money (A18, A19). The witness could not recall how much of this counterfeit money he disposed of (A20, A21). In December 1971 the witness claimed that the appellant told him that he had new and better counterfeit currency; that the present stock of the spurious currency was inferior (A22-A24). Thereupon the appellant gave this witness some spurious currency (A24). That day Stoppiello went to the hospital (A24, A25).

On December 10, 1971 Stoppiello while at the hospital met a person named to him as "Mickey" (A25). Stoppiello related

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*( )This refers to the pagination of the appendix

that he met "Mickey" through "Sal", a person who was instrumental in getting loans from the appellant, for Stoppiello (A25, A26, A29). While at the hospital this witness had spurious currency and he actually gave some to "Mickey". He also discussed future transactions with "Mickey" (A30, A31, A33).

Following Stoppiello's discharge from the hospital on December 17, 1971 he again met "Mickey", this time on December 30, 1971 (A33, A34). On this occasion he sold him some counterfeit money (A34). "Mickey" told Stoppiello that"his people" were pleased with the prior purchases and wanted to make a larger one (A36). "Mickey" and the witness, Stoppiello, then agreed to transact the sale for spuriour currency denominated $5,000 for which the consideration was to be $1,250. This was to occur on January 4, 1972 (A37). Stoppiello thereupon called the appellant and informed him of this possible transaction (A37, A38).

Pursuant to an arrangement with the appellant, Stoppiello met the appellant January 4, 1972. The appellant was accompanied by a friend of his named Lenny Bilts. The place of meeting was "Anton's Luncheonette" (A39). The appellant and his friend were suspicious of "Mickey", the buyer , and thereupon they discussed means to ascertain whether the authorities were involved. In other words, according to

Stoppiello the witness and the appellant were going to substitute ordinary paper for the currency to ascertain whether the authorities were investigating the case (A40, A41). However, "Mickey" did not come at the designated time and therefore Stoppiello called him. Stoppiello was told that the buyer for the currency would come later that day at 2:00 P.M. (A41). Mauro, the appellant, also allegedly told the witness that he was to pass the currency with "Sal" (A42). Thereupon, according to Stoppiello, the appellant told him to go to the appellant's car and take the currency from the back seat (A43-A45). Stoppiello identified the car as a 1971 or 1972 Mustang (A44). Thereupon Stoppiello retrieved the counterfeit from the appellant's car (A45). Stoppiello secreted the money in a nearby apartment house (A45, A46).

Meanwhile "Sal" arrived with "Mickey" (A46).

Ultimately this witness saw the arrest of the appellant and others (A46, A47). Later that day this witness was also arrested (A48).

Stoppiello also testified that after he was arrested he spoke to the appellant about an agent named Whitaker (A50). The appellant accused him of "setting him up" (A50, A51). Further, that the appellant told him that his attorney read a government report showing that the appellant's car was

impounded (A51).

This witness also testified that he saw counterfeit currency in the appellant's car on different occasions (A52). He told the appellant he would not pay off the loan because he was going to take the "bust" for him (A52).

Michael Riley called by the government, testified that he was an agent with the United States Secret Service (A53). He acted as an undercover agent, that is, he would pose as a participant in a criminal transaction, so as to effectuate a successful investigation of a suspect (A53, A54). That on December 3, 1971 he met a person named Sal Seminaro who gave him three $10.00 counterfeit bills (A54). Seminaro was a government informer (A55, A56). He initially met Sal Seminaro December 10, 1971 and went to the Veterans Hospital (A56, A57). There he met Stoppiello, the previous witness (A56, A57, A59). Stoppiello told this witness that he had spurious currency; Riley, the witness, asked to see them and Stoppiello displayed them to him. As a matter of fact he sold him some (A59, A60, A61).

These exhibits were admitted in evidence as government's exhibit 11 (A64).

Riley recounted that he had a discussion with Stoppiello as to future transactions (A64-A66). Stoppiello referred to one "Joe" as his source (A66). Later Riley spoke to Stoppiello

about more transactions and Stoppiello told him that he spoke to "Joe" about a purchase of $10,000 spurious currency at a price of $27.00 for every $100.00 spurious bill (A66).

Later this witness met Stoppiello on December 10, 1971 (A69, A70). At this meeting one or two surveilling agents were nearby (A70). The witness spoke to Stoppiello about the quantity of counterfeit and the price (A71). At this occasion this witness also received two spurious bills from Stoppiello (A71); (Government's Exhibit 12 received in evidence subject to connecting the appellant with the conspiracy (A71, A72, A73). The witness then described the type and nature of counterfeit currency (A73-A75).

On December 30, 1971 Riley, the testifying witness, called Stoppiello and arranged a meeting for January 4, 1972 (A75, A76).

On January 4, 1972 Riley met Stoppiello at Bay Parkway and 72nd Street to acquire additional counterfeit money, the terms of the sale having already been set (A77). Riley was with another agent named Rick Sanno (A77). Seven other agents were nearby (A78). Riley met Stoppiello and Seminaro (A78, A79). He introduced Stoppiello to Sanno, the other agent (A80). Stoppiello and Seminaro agreed to get the counterfeit and transfer the same to this witness (A81).

In the interim, the agent drove his car around and eventually parked it at a gas station near Avenue O (A81). He left the car and went to a gas station and made a telephone call from a booth located in the gas station (A82). While making the call Riley saw the appellant drive a green Mustang car (A83). The appellant "appeared" to be watching him (A83). When Riley completed his call and walked towards his car, the appellant approached him and gave him a "slight pat down". That is touched him at his waist (A83, A84). The witness entered his car (A85). There was another individual in the appellant's car (A85). Meanwhile Riley entered his car and then saw Stoppiello and Seminaro approach. Seminaro entered the witness' car and gave him the counterfeit (A85, A86); (Government's Exhibit 13, A86, A87). This was received subject to connection (A87). Then Riley signaled the other agents and pretended to arrest Seminaro, meanwhile the appellant and the occupant of the appellant's car were arrested (A88).

As the trial progressed, the appellant's trial counsel brought up the issue of the authorities finding counterfeit money in the steering wheel column of the appellant's car (A98, A99). Counsel explained that the basis of his application to suppress was that the search and seizure of the appellant's

car was made approximately two (2) months after the initial seizure of the appellant's car (A99). It thus appeared that the appellant's car was seized by the authorities when the appellant was arrested on January 4, 1972. The car was held by the government and searched in March 1972 (A99, A100). The motion was made at that time by the appellant because the appellant's trial counsel first found out about the search of the appellant's car when he was given 3500 materials shortly before he made the motion and that he did not know that the product of the search and seizure was to be part of the government's case (A100, A113, A114).

The government attorney then being asked by the Court under what authority the car was "forfeited" stated "it was never actually forfeited. It was returned to the defendant" (A101).

The Court explained to government counsel that once the car was ascertained to transport counterfeit bills it was subject to forfeiture and that therefore since the car belonged to the government every part of the car would be under the government's control and the government had a right to take it apart. The Court explained that that's not what happened in this case because the defendant was arrested and the agents took full and complete custody of the car but that they had no proof that the car was being used to transport counterfeit bills and then the Court added that as a matter of fact the car was never forfeited (A102).

The Court further stated that the authorities should have gotten a search warrant (A106).

During further argument by the government it was admitted that the complaint against the appellant in the Magistrate's Court was dismissed (A110). Nevertheless the car notwithstanding the dismissal of the complaint in the Magistrate's Court, was retained by the government (A110, A111). The Court then stated that there was no ground to hold the appellant even after the government had the car and therefore the Court inquired as to what grounds the government had to take the steering wheel apart (A111).

Then the government argued that the government dismissed the case pursuant to the insistence of the Magistrate (A111).

The Court pointed out a difficulty, namely that the arrest was made in January and the car wasn't searched until March (A111). Further the Court pointed out that the government didn't proceed with any forfeiture by advertising and therefore the Court believed that the government had no grounds for a forfeiture (A111, A112).

The Court and counsel then formulated the law underlying the disputed issue. That issue was that the basis for determining the legality for the seizure of the car was the government's right to forfeit the car and that the usual law as to search and seizure incident to an arrest was not an issue (A123). Counsel for the government then cited 49 U.S.C. 781

subdivision (a) subsection (3) which related to a forfeiture of a vehicle used to facilitate the transportation, carriage, receipt, concealment, purchase, sale, borrowing, exchange or giving away of contraband (A124, A125). Government's counsel argued that the car was used by Mauro January 24, 1972 to make an observation of Riley, the government witness who testified he was making a telephone call from the public telephone booth; that earlier Riley observed the appellant's car to be parked several feet behind the agent's car and that the appellant was in his car at that time and that Stoppiello testified that Mauro was suspicious of the person who was going to make the purchase of the counterfeit currency (A125). Therefore government counsel concluded that the appellant's car was being used to insure the safety of the money or the integrity of the transaction and therefore was being used to facilitate what Mauro believed to be a sale (A125, A126). It was then admitted by the government counsel that on March 3, 1972 Stoppiello agreed to cooperate with the government and told an agent that the car contained counterfeit currency hidden in the steering column (A127).

Appellant's trial counsel pointed out this was after the Magistrate dismissed the case in February (A128).

There was further argument by appellant's trial counsel that the appellant did not know of the seizure of the bills (A131, A132).

Further colloquy disclosed that the appellant's attorney discovered the above matter when he was given a copy of the report of an agent during the course of the trial (A138). Furthermore the Court ruled that the government had the burden on that application to show that the search and seizure was proper (A138).

As to the forfeiture proceeding the government referred to files, Government's Exhibit 36 for identification, that the agents seized the car and turned it over to the Customs Bureau; the government attorney stated this was to show that the forfeiture was intended (A139). Appellant's trial counsel then stipulated that those files were regularly kept by the Customs Bureau (A140). They were accordingly admitted in evidence as Government's Exhibit 36 (A141).

Government's Exhibit 37 in evidence were files of the Public Stores Sales and Seizures, the Bureau of Customs (A141).

It was again established that the dismissal of this case against the appellant by the Magistrate was February 15, 1972 (A149).

It was also established that ultimately the government returned this car to the appellant (A149, A150).

Initially government counsel explained that the case was dismissed in the Magistrate's Court because of the six month rule promulgated by a plan to bring cases on for disposition within six (6) months (A150).

Then the government counsel further explained that:

> "The period between that time, our position vis a vis Mauro, or at least the United States Office position was here is a man who at that time the government had no evidence to go against. My personal feeling was as long as that was the case there was no reason to further harass him by keeping his car."
>
> "Whether or not I was informed of a discovery of the bills in the car shortly after they were discovered...and I might say, Your Honor, my reaction to the agent at that time was just the same that you had yesterday."
>
> "I said, 'Why didn't you call me up and ask for a warrant before you seized those bills?'..." (A154)

Further colloquy on the part of the government's counsel disclosed that:

> "In any event, the car was given back to the man, I suppose not out of any legitimate prosecutorial purpose but simply because we had no case against the fellow at that time and he ought to get his car back, that is all..." (A154, A155).

The Court indicated that appellant and his former attorney knew that the counterfeit currency was concealed in the steering column of the returned car (A156, A157).

The Court denied the motion holding that: (a) the car was legally seized because there was proof that the car was used to transfer bills to Stoppiello (A169); (b) the government failed to institute timely forfeiture proceedings, but the appellant also failed to proceed in timely fashion waiting until March 13, 1972, (A169, A170); (c) the government delay in regard to the impounding of the car was not unreasonable because of a continuing investigation (A170); (d) the return of the car was irrelevant and the government had a right to forfeit the car (A170); (e) the appellant's motion was not timely made (A171).

Finally, an agent by the name of Viggiano testified that he was a Secret Service Agent and that he became involved in this case initially on January 24, 1972 (A177). That he arrested the appellant and also Stoppiello (A178).

The car was seized by the agents and was identified by this witness as a 1967 Mustang (A179).

That on March 3, 1972 this witness met Stoppiello and as a result of that conversation went to a garage known as "Max Ford's Garage" at Varick Street (A179, A180). The appellant's car was there (A18). He searched the car, took

apart the steering column and found the counterfeit currency (A180, A181). These were admitted in evidence as Government's Exhibit 38 (A181, A182).

On cross examination, Viggiano testified that on January 4, 1972 he saw the appellant and his car at 2:30 P.M. (A183, A184). However he didn't see any spurious currency in the appellant's car (A184).

Other agents searched the car but found no counterfeit in it (A184, A185).

He next saw the appellant's car on March 3, 1972 (A185). The Customs Bureau had possession of it from January 4, 1972 to March 3, 1972 (A185). The appellant was not in possession of that car from the time of his arrest until March 3, 1972 (A186).

The appellant was not present when the car was searched (A187).

POINT I

THE SEARCH AND SEIZURE OF THE CONTENTS OF THE APPELLANT'S CAR, AND THE RETRIEVING OF THE COUNTERFEIT COIN, TWO MONTHS AFTER THE INITIAL SEIZURE OF THE CAR, WAS IN VIOLATION OF THE APPELLANT'S RIGHT OF PRIVACY UNDER THE 4TH AMENDMENT TO THE FEDERAL CONSTITUTION AND FURTHERMORE THE TAKING OF THE CAR AND THE RETENTION THEREOF AS WELL AS THE CONSEQUENT DISMANTLING OF PARTS OF THE CAR TO RETRIEVE THE COUNTERFEIT, VIOLATED THE APPELLANT'S RIGHTS UNDER THE 5TH AMENDMENT TO THE FEDERAL CONSTITUTION INSOFAR AS IT PROVIDES FOR DUE PROCESS OF LAW.

The relevant statutes underlying forfeiture and impounding of property is found initially in 49 U.S.C. 781 which provides that:

> "CONTRABAND ARTICLES - Transportation - Definitions - (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon or by any means of any...vehicle,...; (2) to conceal or possess any contraband article in or upon any..., vehicle, ..., or upon the person of anyone in or upon any..., vehicle,...; or (3) to use any..., vehicle, to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article."

Subdivision (3) of this statute provides that counterfeit coin or obligation of the United States is within the scope of the statute.

49 U.S.C. 782 in its relevant part provides as follows:

> "SEIZURE AND FORFEITURE OF VESSEL, VEHICLE, OR AIRCRAFT USED - INNOCENT OWNERS -
> "Any vessel, vehicle or...which has been or is being used in violation of any provision of Section 1 (Section 781 of this Title), or in, upon, or by means of which any violation of Section 1 (Section 781 of this Title) has taken or is taking place, shall be seized and forfeited...;..."

The aforementioned statutes do not provide for any evidentary standard to validate the seizure of a car and its forfeiture. The 4th Amendment generally provides that for a search and seizure to be proper, there has to be reasonable cause underlying the warrant issued; in this case there was no warrant, and it would seem that probable cause may be the

applicable standard for a warrantless search and seizure. In other words the requirements for the issuance of a search warrant, cannot be diminished where there is a search and seizure without a warrant. See Wong Sun v. United States, 371 U.S. 471 (1963). However, since the Court below did not rely on any 4th Amendment considerations but stated that the forfeiture was the issue, it would seem that before property can be forfeited, confiscated or impounded by the government, the government proceed upon clear and convincing evidence or evidence that the use of the vehicle was a criminal use beyond a reasonable doubt.

As was stated in Clay v. United States, 239 F. 2d 196, (Cir. 5th, 1956) at pages 200-201:

> "If officers have the right to interfere with the essential pursuit of a nation of automobilists, it must be based on what is known or reasonably believed before the commandeering starts. To allow justification to arrest on discovery after intrusion would permit 'the government...to justify the arrest by the search and at the same time to justify the search by the arrest'..."

It may be recognized that the automobile today is adjunct to the majority of the American people's existence. It is an element of the constitutional right to travel; see Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. Breckenridge, 403 U.S. 88, 105, 106 (1971).

It is submitted, that at the time the car was seized there was not one iota of evidence and absolutely no probable cause that the vehicle contained any contraband. The fact that a car may be driven to the site where a crime is being committed, does not warrant the seizure of the car on the grounds of a statutory forfeiture. In Howard v. United States, 423 F. 2d, 1102 (Cir. 9th, 1970), Howard was arrested driving a Chevrolet which carried marijuana. The Chevrolet was under prior surveillance by the authorities who observed it entering the United States from Mexico being driven by a government informant who left it in a place designated by a person whom the informant telephoned. Howard came to the area of the Chevrolet driving a Buick automobile which he parked near the Chevrolet. He then drove the Chevrolet from the place he parked his Buick and was arrested and searched. In searching Howard, the authorities seized the keys to the Buick. Using these keys the authorities entered the Buick, drove it to a parking lot and then searched it finding heroin. It was held that the search of the car, the Buick, which the defendant in that case drove so that he could access to the Chevrolet, was void. The Court reasoned that there was no warrant to search the Buick, the search was not incident to the arrest and that there was no consent to search. It was recognized that the basis for the search was that it was incident to a seizure of an automobile under

the forfeiture provisions of 49 U.S.C. 781 and 782. It was further reasoned that that seizure was valid only if the authorities had probable cause to believe that the Buick had been used to "facilitate" the transportation of the narcotics in the original car, the Chevrolet, that was driven over the United States border (at page 1103). It was then held that:

> "...there was no evidence that the seizing officers had cause to believe that the Buick then contained, or ever had contained, contraband. Nor was there any evidence that an illegal transaction had taken place within the vehicle. The government proved merely that the officers at the time of the seizure, knew that Howard had driven the Buick car to the location of the load car. As in Platt v. United States,...163 F. 2d 165, the seized car was merely the means of locomotion by which the person suspected of participating in illegal drug traffic reached a site of that activity. The ease or the difficulty of transporting the marajuana in the Chevrolet was not affected by the manner in which Howard reached the load car. The use of an automobile to commute to the scene of the crime does not justify the seizure of that automobile under Sections 781 and 782..." (At pages 1103-1104).

So also in this case. On January 4, 1972 the time of the arrest of the appellant and the seizure of the car, there was no evidence whatsoever that the appellant used the car as a storage place for contraband or counterfeit. The most that the authorities could claim was that the appellant arrived at the scene in an automobile. Nor did the government during the argument of the application in the Court below ever advance the argument that the car was seized because it

contained any contraband. Rather the government argued that the car was used to facilitate the possible transfer of the currency or to protect the possessors of it, (A125-A126). It is respectfully submitted that because of the widespread use of automobiles, anyone's automobile can be seized if that person is committing a crime and arrives at the scene in an automobile. An automobile under those circumstances is not the means of carrying out the crime. It may be the means of transportation to the scene of a crime, but it is not an ingredient of the commission of the act. Persons can go to the scene of a crime by public transportation or by walking. Because of the drastic nature of a forfeiture, it is respectfully submitted that to effect the forfeiture of a vehicle the government be put to stringent proof and that the statutes be narrowly construed.

It is respectfully submitted that the issue was whether the agents knew at the time of the seizure that the car contained the contraband. There is no evidence in this record that there was such knowledge. As a matter of fact, the Court in denying the motion stated that the investigation was a continuing one. In other words the Court stated that the authorities had a right to seize the car under a forfeiture statute, hold the car because the investigation was continuing, and thus ultimately investigate further to ascertain whether the car contained the counterfeit. It is submitted that a search is good and bad at its commencement. The product of a

search does not justify the inception of the search if the inception is not founded on sufficient evidence. It

It is further put to this Court that what actually happened here, was not the conventional search and then seizure of contraband as incidental to a warrantless arrest. Rather there was initially a seizure for no cause, a retention of the seized car, for two months, a search of the seized car, and ultimately an indictment against the defendant. It seems, that both the search and seizure must be valid. As was stated in U.S. v. Jeffers, 342 U.S. 48 (1951), at page 52:

> "...we do not believe the events are so easily isolable. Rather they are bound together by one sole purpose to locate and seize the narcotics of respondent. The search and seizure are, therefore incapable of being untied..."

Since the authorities did not know at the time of the seizure of the car that it contained any counterfeit currency, there was no probable cause to seize the car. Even in automobile cases where the Courts recognize that the mobility of an automobile is an exception to the warrant requirement of the 4th Amendment, it has been held that to justify the seizure of a car there be probable cause that the car contained the contrband; see Dyke v. Taylor Implement Manufacturing Co., 391 U.S. 216, at pages 221-222; Chambers v. Maroney, 399 U.S. 42, at pages 46-47.

In U.S. v. Bailey, 458 F. 2d 408, (Cir. 9th, 1972), the authorities procured a search warrant to investigate a robbery. The affidavit submitted to procure the search warrant alleged that on a prior occasion the accused was arrested in the described car. It was concluded that because the automobile may have contained the proceeds of the robbery, the search warrant should extend to the car, see page 410 of 458 F. 2d. When the warrant was executed and the car searched, it was found that the automobile search was void, the Court holding that there must be probable cause that the property to be searched or the automobile contained the evidence subject to the seizure and that past possession (there was no such claim here) was insufficient to support probable cause at the time of the seizure, namely that the evidence was contained in the property subjected to the search, see page 411 of 458 F. 2d.

In Almeida-Sanchez v. United States, 413 U.S. 266, (1973), an automobile was stopped 25 miles from the Mexican border by a roving border patrol of the United States Immigration Service. The car was searched for aliens. The authorities had no warrant and no probable cause to believe that the accused committed any offense. The search revealed that the car contained marajuana. The government argued that the

authorities had a right to stop the automobile under the Immigration and Nationality Act, 8 U.S.C. 1357 (a) which provided for the warrantless searches of automobiles within a reasonable distance of a boundary of the United States. The opinion in that case recognized that the stop and search of a moving automobile could be made without a warrant and held that that was a narrow exception to the warrant requirements of the 4th Amendment. It was also stated that that doctrine did not:

> "Declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search..." (At page 269).

It was further stated that:

> "...it is clear, of course, that no act of Congress can authorize a violation of the Constitution. ..." (At page 272).

It was finally recognized that:

> "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual agaist certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to Constitutional safeguards..."

In U.S. v. McCormick, July 17, 1974, Cir. 9th, 15 Criminal Law Reporter 2433, it was held that the Federal Forfeiture Statutes, are constitutional but nevertheless are governed by 4th Amendment considerations. In that case the defendant's

automobile parked in front of his house was seized on the theory that it concealed contraband. The authorities had no warrant. It was held that in construing the forfeiture statutes, the case law as to search and seizure governed. Further, that the fact that an automobile is involved, does not necessarily make a warrantless search a valid exception to the general warrant requirements of the 4th Amendment. It was further held, the Court relying on One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, that an automobile is not the obvious and apparent type of contraband subject to search and seizure, but is derivative contraband.

Consequently the subsequent search of the automobile remote in time and place from the initial arrest of the appellant and the seizure of the car, was void. Furthermore, at the very least since the authorities had the car in their possession and the car was stationery they should have first made application to procure a search warrant to dismantle that portion of the car where the currency was said to have been concealed. See Coolidge v. New Hampshire, 403 U.S. 443, U.S. v. McCormick, supra.

In Carwell v. Lewis, 41 L. Ed., 2d 325, 1974, there was no decisive ruling by the United States Supreme Court in a case involving the seizure of an automobile from a suspect, who was in custody, where the authorities had a warrant of arrest.

The issue of that case was whether under the 4th Amendment the authorities had a right to seize an automobile and examine its exterior at a police impoundment area, where the car was removed from a parking lot. The facts disclosed that the authorities had probable cause for the arrest of the suspect and that they also had probable cause that the car was being used in the commission of a crime being investigated because a similar automobile was observed leaving the scene of the crime, the color of the suspect's automobile was similar to the color of the paint scrappings from the victim's car, and the suspect's car had repair work done at certain portions of it showing a consciousness of guilt, and lastly, the victim's calendar showed he had a notation to call the suspect. The suspect was invited by the police to appear at headquarters and he drove his car to the headquarters and parked it in a public lot half a block away. Later that afternoon the authorities arrested him pursuant to an arrest warrant. Prior to his arrest he was permitted to call his lawyer and attorneys appeared on his behalf at the time of the formal arrest. At the time of the arrest his car keys and a parking lot claim check were released to the police and the authorities arranged for the car to be transported to an impoundment area. The next day the authorities examined the exterior of the car and procured evidence from paint scrappings

Notwithstanding these facts, there was no majority in the United States Supreme Court. Mr. Justice Blackmun wrote an opinion sustaining the police procedures which was joined in by the Chief Justice of the United States and Justices White and Rehnquist joining. Mr. Justice Powell, did not join in that opinion but sustained the conviction on the grounds that because the case came up by way of a writ of habeas corpus to test the state conviction, the Court should not have entertained that case. Four other judges in an opinion by Mr. Justice Stewart joined with Justices Douglas, Brennan and Marshall joining, held that the procedures violated the 4th Amendment to the Federal Constitution. The dissenting opinion held that the authorities should have first procured a search warrant. In other words, Mr. Justice Stewart with three other justices held that there was ample opportunity for the police to first procure a search warrant and that the fact that an automobile was involved, did not remove the matter from the warrant requirements of the 4th Amendment.

During the argument of the motion, the government attorney stated that he told the agents after the discovery of the counterfeit, that they should have gotten a warrant before they made the seizure (A154).

The government attorney explained to the Court that he was in error; that he thought a warrant was required to make the seizure in the car, until he read a case; the Court then

stated that the case he read was irrelevant (A154). Then the government attorney admitted that at the time the car was returned to the appellant it was because the government had no case against the appellant (A154, A155).

It is also noteworthy that in this case the appellant was first indicted the July following his initial arrest in January 1972, the dismissal of the charges against him in the Magistrate's Court in February 1972, the examination of the automobile in March 1972.

It is respectfully submitted therefore that the government openly admitted that there was no probable cause to hold the appellant at the time of his arrest, and at the time of the seizure of the car.

It is respectfully submitted under the circumstances of this case the initial arrest of the appellant was therefore void because it was not founded on probable cause; that the dismissal of the case by the Magistrate constituted res adjudicata, that there was no probable cause to hold the appellant. Therefore there would be no probable cause for the holding of his car which was incident to the arrest not founded on probable cause. Probable cause it is submitted under the 4th Amendment to the Federal Constitution is the

governing standard to determine the validity of an arrest where the authorities have no arrest warrant. See Federal Practice and Procedure, Wright, Section 77; Davis v. Mississippi, 394 U.S. 721; Wong Sun v. United States, 370 U.S. 471.

Furthermore, since the appellant was first indicted the June following the January arrest and seizure of the car, there is ample showing that the government did not even have the minimum evidence required to support a valid indictment. See Wright, Federal Practice and Procedure, Section 110.

Furthermore, the government did not immediately institute the applicable proceedings to validate the seizure of the car or to legally effectuate the forfeiture. 49 U.S.C. 784 provides that other statutes govern the seizures and forfeitures under Sections 781 and 782 of 49 U.S.C. It is submitted, that 19 U.S.C. 1604 is applicable. That Section states in its relevant part that:

> "...it shall be the duty of every United States Attorney immediately to inquire into the facts of cases reported to him by collectors and the laws applicable thereto and if it appears probable that any fine, penalty or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States District Court is necessary forthwith to cause the proper proceedings to be commenced and prosecuted without delay,..."

POINT II:

THE APPLICATION TO SUPPRESS THE EVIDENCE SHOULD NOT HAVE BEEN DENIED BECAUSE SUCH APPLICATION WAS NOT MADE IN A TIMELY FASHION.

The record bears out that present counsel who was trial counsel for the appellant was retained after prior counsel who represented the appellant was discharged. Appellant's counsel argued in the Court below that he did not know that the counterfeit was found concealed in the steering column of the seized automobile. Furthermore, at that time the car already was in the possession of the appellant.

It is submitted, that the issue in this case was that since a fundamental constitutional right of the appellant was at stake, the same could not be forfeited or waived by counsel for the appellant. Certainly, the record is silent as to just why former trial counsel did not communicate this fact to the appellant's present counsel (A133, A137, A160, A161, A164).

Furthermore, it can not be said that it was part of the trial strategy that counsel would not make a timely motion to suppress the evidence; see Henry v. Mississippi, 379 U.S. 443, (1965), rehearing denied 380 U.S. 926. In that case, a vital constitutional question was asserted by the petitioner. The respondent argued that since it was a state trial, state law governed and the denial of the enforcement of the constitutional right rested on state procedural grounds. Nevertheless it was held by the United States Supreme Court on pages 451-452 that:

> "...although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims..., we think that the deliberate bypassing by counsel of the rule as a part of the trial strategy would have that effect on this case."

Certainly it was not shown that this was part of the trial strategy of counsel. See also Kaufman v. United States, 394 U.S. 217 (1969) at page 221. See also Himmelfarb v. United States, 175 F. 2d 924 (Cir. 9th, 1949) at page 931.

So also this Court in United States v. Calabro, 467 F. 2d 973, (1972) considered an issue as to the scope of an attorney's authority in regard to waiving the rights of a defendant. This Court stated on pages 985-986 in part that:

> "The American Bar Association Project on Standards for Criminal Justice concludes that a defendant is entitled to make the ultimate decision only in regard to whether to plead guilty, whether to waive a jury, and whether to testify: 'all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client'..."

It is respectfully submitted that even where an attorney desires as part of a trial strategy to waive or forego a right of a client, he could only function after consultation with his client.

There is no proof in this case that in regard to the fundamental right of privacy, in further regard to due process of law, and the constitutional right of privacy, counsel or the client adopted as part of its strategy the foregoing of a motion to suppress prior to trial reserving that issue for the trial itself. Not only that, but the record is completely

silent that Mauro even if he knew that the counterfeit were concealed in the car, he had a right to move to suppress or what safeguards should be adopted in regard to the disclosure of this evidence by the government. It is submitted that a waiver of a fundamental right is ineffective unless made knowingly; Johnson v. Zerbst, 304 U.S. 458.

There was no evidentiary hearing in the Court below as to any waiver of this right by the appellant by not making the motion prior to trial. It appears that there is a presumption against the waiver of a 4th Amendment protection; U.S. v. Curiale, 414 F. 2d, 744, (Cir. 2, 1969) Cert. den. 396 U.S. 959.

As was held by this Court in U.S. v. Tramunti, July 12, 1974, Slip Opinion at page 4811, number 1102, September 1973 Term, docket number 74-1398, at pages 4820-4821:

> "...we cannot expect clarvoyance on the part of defense counsel, nor, as we have indicated legal acumen on the part of the defendant... The appellant claims a serious infringement of Fifth Amendment and statutory rights which are fundamental in our system of jurisprudence..."

At the very least, the Court below should have held a full evidentiary hearing to ascertain just why there wasn't a motion made before trial. Former counsel for the appellant did not raise it. In this respect, in effect, the appellant was therefore not represented. Present counsel on the record claimed he did not know of the retrieving of this particular facet of the government's evidence until during the trial when he read documents given to him under 18 U.S.C. 3500.

Nor can it be claimed that the appellant knowingly waived this important right. Since there is a presumption against a waiver, it would seem the government had the burden of proof to produce evidence to rebut the presumption.

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

AARON SCHACHER
Attorney for Appellant

ARNOLD E. WALLACH
of Counsel

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of Sept., 1974 deponent served the within Brief upon M-L Attorneys

attorney(s) for appellee

in this action, at 225 Cadman Plaza East Brooklyn N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
30 day of Sept, 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976